STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

GLOBALCOM, INC.	)	
	)	
vs.	)	
	)	
ILLINOIS BELL TELEPHONE COMPANY	)	**Docket No. 02-0365**
	)	
In the Matter of a Complaint Pursuant to 220	)	
ILCS 5/13-515, 220 IL CS 5/10-101 and 10-108	)	

AMERITECH ILLINOIS' APPLICATION FOR REHEARING

Karl B. Anderson
Illinois Bell Telephone Company
225 West Randolph Street, Floor 25D
Chicago, Illinois 60606
(312) 727-2928

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Illinois Bell Telephone Company ("Ameritech Illinois" or the "Company") hereby requests that the Commission grant rehearing as to portions of the Order (the "Order") dated October 23, 2002.

I. SUMMARY OF POSITION

In its Complaint, Globalcom alleged that Ameritech Illinois acted unlawfully by (i) enforcing the termination charge provisions of tariffs for interstate special access services within the jurisdiction of the Federal Communications Commission ("FCC") and the identical termination charge provisions of a parallel Illinois tariff, and (ii) enforcing the collocation requirement for the provision of new combinations of unbundled loops and dedicated transport facilities ("new EELs") in accordance with the terms of an effective and approved Illinois tariff.

The Commission's October 23, 2002 Order correctly dismissed the portion of the Complaint relating to the interstate special access tariff on the grounds that the Commission does not have jurisdiction to grant the relief requested by Globalcom with respect to interstate special access circuits purchased out of an FCC tariff. The Order also correctly recognized that the FCC had consistently upheld the assessment of termination charges in exactly the circumstance presented by Globalcom's complaint: termination of the purchase under the interstate access tariff coupled with purchase of access to an EEL. See Section II.A infra.

The Order then departed from that holding, however, in several critical respects. *First*, despite the Commission's correct holding that it had no jurisdiction to interpret the FCC tariff with respect to the EEL scenario that was presented by Globalcom's Complaint, the Order decided *sua sponte* that termination liability would not apply where termination of the purchase under the FCC tariff is coupled with purchase under the Illinois tariff. The Commission had no jurisdiction to decide that interstate issue in the first place. On the merits, the Order (1) was based on a fundamental misunderstanding that termination charges reflect compensation for the loss of future revenues after termination, because such charges are instead designed to make up for discounts that were erroneously granted *before* termination, (2) was contrary to the plain language of the FCC tariff (which clearly provides for termination charges, as confirmed by the fact that a temporary exemption was created when the FCC changed the rules for interstate/ intrastate classification of circuits in 1989, and that exemption has long since expired), and (3) contrary to the filed rate doctrine. See Section II.B infra.

Second, despite recognizing that the FCC and this Commission had previously upheld termination charges in the precise scenario presented by Globalcom (termination of purchase under tariff coupled with purchase of access to an EEL), the Order construed the identical Illinois tariff to reach the exact opposite result. The Order thus repeats the substantive errors it made in interpreting the FCC tariff. A deeper error is evident when one considers the Order's holdings on termination liability as a whole. According to the Commission, termination charges are proper where the carrier terminates its purchase under the FCC tariff and purchases an EEL, but *im*proper where the carrier (i) terminates its purchase under the FCC tariff and purchases under the Illinois tariff, and then (ii) terminates its purchase under the Illinois tariff and purchases an EEL. Thus, the Order provides a blueprint for the customer to do *in*directly what the FCC tariff (repeatedly upheld by the FCC and upheld here by the Commission) says it cannot do directly: terminate its purchase under the FCC tariff and purchase an EEL without paying a termination charge. See Section II.C. infra.

Third, to compound its errors on the merits, the Order holds that Ameritech Illinois acted unreasonably and in violation of Section 13-514 simply by maintaining and defending its position with respect to termination liability (even though Ameritech Illinois' position was supported by the Commission's decision in Level 3 Communications and by numerous FCC precedents). Even putting aside the fact that Ameritech Illinois' position was correct, the Order is arbitrary, capricious and fundamentally unfair because it sanctions Ameritech Illinois for failing to predict with perfect clarity a 180-degree turn in Commission policy that was announced for the first time in this case. See Section II.D infra.

Fourth, with respect to collocation, the Order concludes that Ameritech Illinois violated Section 13-514 by maintaining that a new EEL should be defined as a combination of unbundled loop and dedicated transport with the termination in the CLEC's collocation arrangement. That same definition of a new EEL, however, was included in the Company's effective Interim Compliance Tariff governing the provision of new EELs. Under the "filed rate doctrine," Ameritech Illinois was not only allowed to enforce the terms of the tariff (including the collocation requirement), it was required to do so – and the Order recognizes that it was. See Section II.E infra.

The Order nonetheless holds that the Company should be held legally "culpable" for having included the collocation requirement in the tariff in the first place. That decision was patently unreasonable and unfair. The collocation requirement was based on a reasonable and good faith attempt to address complex questions of first impression under a new statute, Section 13-801(d)(3) of the Act. True, the Commission's final Order in Docket 01-0614 (issued on June 11, 2002, after an extensive litigation and briefing) did not fully agree with Ameritech Illinois' interpretation of Section 13-801(d)(3), but Ameritech Illinois should not be held legally culpable after the fact for not being clairvoyant enough to predict every facet of the outcome of the case in advance. Thus, the Order adopts a rule heretofore consistently rejected in Illinois, i.e., that a regulated entity can be ordered to pay damages based on a retroactive adjustment to a lawful and effective tariff, in contravention of the filed rate doctrine, as "punishment" for taking and defending, in good faith, a position on a contested issue in a Commission proceeding simply because the Commission ultimately rejects that position. The Order is arbitrary and capricious, and contrary to law, and violates of Ameritech Illinois' fundamental right of due process. See Section II.F infra.

For all the reasons discussed herein, the Order's findings that Ameritech Illinois has violated Section 13-514, and its decision to order remedies, including the award of damages and attorney's fees, based on those findings, should be reversed. Globalcom's Complaint and the relief requested therein should be denied in their entirety.[1]

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[1] Globalcom's Complaint is also unfounded in light of the D.C. Circuit Court of Appeals' recent decision to reverse and remand the FCC's UNE Remand Order in United States Telecom Assn. v. FCC, 290 F.3d 415, 427 (D.C. Cir., May 24, 2002) ("USTA"). As discussed in the Company's Motion to Dismiss (pp. 3-4), the decision in USTA makes it clear that all of the network elements required to be unbundled by the UNE Remand Order (including unbundled loops and dedicated transport, the elements which comprise an EEL) were unbundled under an unlawful version of the "impair" test, and whether they can legitimately be unbundled under the Act will have to be determined by the FCC on remand from USTA. For the reasons discussed in the Motion to Dismiss, the Court's decision undermines Globalcom's Complaint because it is predicated on the unbundling rules that were rejected in USTA. On September 4, 2002, the D.C. Circuit denied petitions for rehearing of the USTA decision filed by the FCC and others and suspended the mandate to vacate the UNE Remand and Line Sharing Orders until January 2, 2003. USTA v. FCC, Order, Nos. 00-1012 and 00-1015 (D.C. Cir., filed Sept. 4, 2002).

II. TERMINATION CHARGES

A. INTRODUCTION

1. Ameritech Illinois' Interstate and Intrastate Access Tariffs

Globalcom has purchased the vast majority of its special access circuits from Ameritech Illinois under the Company's interstate special access tariff, FCC No. 2. (Complaint, ¶ 35; Globalcom Ex. 4.0, p. 4; Globalcom Ex. 5.0, p. 8). In fact, Globalcom's Complaint (¶ 13) states that the special access service arrangements entered into by Globalcom prior to January, 2002 are governed exclusively by FCC Tariff No. 2.[2] Tariff FCC No. 2 provides for an optional payment plan ("OPP") under which a customer, like Globalcom, has the option of agreeing to pay special access service under the tariff for a specified period of time (12, 24, 36, 48, or 60 months), rather than on a month-to-month basis. In return for that term commitment, the customer obtains a substantial price discount on special access service throughout the established term.

The tariff further provides that "customers requesting termination of service prior to the expiration date of the OPP term will be liable for a termination charge." It specifies that "[t]he termination charge . . . will be calculated as follows: The dollar difference between the current OPP rate for the OPP term that could have been completed during the term the service was actually in service, or the monthly rate for services in place less than 12 months, and the

[2] In its Amended Complaint (¶ 13), Globalcom alleged that Ameritech Illinois improperly "discouraged" Globalcom from obtaining special access service from Ameritech Illinois' intrastate special access service tariff, ICC No. 21. Globalcom, however, failed to present any evidence to support this allegation. In accordance with criteria established by the FCC, special access service is provided in accordance with the interstate tariff if the customer certifies that the interstate traffic on the service involved constitutes more than ten percent of the total traffic on that service. (Am. Ill. Ex. 3.0, pp. 2-3). As Mr. Wince acknowledged, when it ordered special access circuits from Ameritech Illinois, Globalcom determined and certified that the interstate traffic on the requested circuits was expected to exceed ten percent of the total traffic on such circuits. (Globalcom Ex. 1.0, p. 8). Based upon his review of Globalcom's description of its network, Ameritech Illinois witness Mindell concluded that there is no reason to question the accuracy of Globalcom's determination. (Am. Ill. Ex. 5.0, p. 6). Mr. Mindell's testimony was unrebutted.

customer's current OPP rate for each month the service was provided." The Company's Illinois intrastate special access tariff (which governs a handful of the special access arrangements entered into by Globalcom after January, 2002) contains OPP plan and termination charge provisions identical to those of the FCC tariff. (Am. Ill. Ex. 1.0, p. 13; Am. Ill. Ex. 3.0, pp. 5-16).

An understanding of how the termination charge works is critical to the proper resolution of this rehearing application, and as we show below the challenged aspects of the Commission's Order are founded on a *mis*understanding of these charges. To illustrate: Assume Carrier "A" purchases an interstate special access circuit under an OPP plan, and commits to a 60-month term. During that term, Carrier A would pay a lower rate than a carrier ("B") that purchases an identical circuit with a shorter term commitment (say, 12 months) or on a month-to-month basis without a term commitment. If, however, Carrier A terminates its circuit after 12 months, it would pay a termination charge, calculated as the difference between (i) the amount that A did pay prior to termination (12 months at the low 60-month rate) and (ii) the amount that it would have paid if it had correctly stated its term up front (12 months at the higher, 12-month rate). In effect, the amounts paid prior to termination are "trued up" to put A in the same position it would have been if it had correctly stated its term commitment at the outset, as Carrier B had done. A and B would have received identical circuits, for an identical term, and with a termination charge to A the amounts paid by A and B over the 12-month term would be the same. (Am. Ill. Ex. 1.0, p. 16).

2. Globalcom's Complaint

The events which ultimately gave rise to Globalcom's Complaint began in late December of 2001, when Globalcom made its first and only request for the "conversion" of special access circuits to EELs. At that time, all of Globalcom's special access circuits were being purchased out of FCC Tariff 2. Globalcom's request, which involved five circuits, was denied by Ameritech Illinois because it violated the FCC's prohibition on "commingling." At that time, Globalcom also objected to Ameritech Illinois' position that the termination of the special access circuit prior to the expiration of the OPP term for which Globalcom committed to purchasing the circuits would trigger the payment of termination charges. In order to avoid being billed for termination charges under FCC Tariff No. 2, Globalcom declined to make any additional similar requests for "conversion" of special access services to EELs until its dispute with Ameritech Illinois over the applicability of those charges was resolved.

On March 14, 2002, Globalcom submitted a Notice of alleged violation of Section 13-514. Globalcom demanded that Ameritech Illinois "correct this situation and revoke the threat of assessing termination penalties for Globalcom's request to convert special access to EELs." (Globalcom Amended Complaint, Attachment D, p. 4). The Notice referred specifically to the termination liability provision of "FCC Tariff No. 2, 26th Revised Sheet, Page 309.1, Sec. 7.4.10(c)." The Notice contained no reference to the provision of Ameritech Illinois' intrastate special access tariff, Ill.C.C. No. 21. This is not surprising because, at the time of the Notice, Globalcom was not purchasing any special access circuits under an OPP out of the Illinois tariff.

Globalcom filed its First Amended Complaint on May 16, 2002, over two months after it submitted its Notice of alleged violation. By that time, Globalcom had purchased a handful of special access circuits out of the Illinois tariff. In its Complaint, Globalcom took the position that Ameritech Illinois should not be allowed to apply the termination charge provisions of either its interstate or intrastate tariffs to the conversion of special access circuits to UNEs.

3. The Commission's Order

The Commission's Order rejected Globalcom's request that the Commission require Ameritech Illinois to allow the conversion of interstate special access circuits to UNE combinations without the imposition of the termination charges contained in the Company's FCC tariff (the "Ruling"). The Order correctly upheld the ALJ's decision that Ameritech Illinois' enforcement of the termination liability provision of FCC Tariff No. 2 is "not in derogation of federal law and FCC regulations, and the Commission has no authority to direct Ameritech Illinois to depart from the terms of federal tariffs." Order, at 40. As the Commission correctly explained, "FCC tariffs pertain to interstate, not local, telecommunications services and exist exclusively under federal authority." Id. at 41. This result is further supported by numerous orders in which the FCC has made it absolutely clear that a CLEC's ability to request the conversion of an existing special access circuit to an existing combination of UNE loop and dedicated transport does not in any way relieve the CLEC of its preexisting, separate legal duty to pay any applicable early termination charges under special access tariffs. Those Orders include the following:

(i) UNE Remand Order, ¶ 481, n. 985 ("We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts");

(ii) Bell South Georgia and Louisiana 271 Order, CC Docket 02-35, Memorandum Opinion and Order, FCC 02-147, ¶ 200 (released May 15, 2002) ("We reject comments by US LEC/XO that the disallowance of commingled traffic, early termination penalties, and surcharges are obstacles to their ability to convert special access circuits to EELs");

(iii) Verizon Pennsylvania 271 Order, CC Docket 01-138, Memorandum Opinion and Order, FCC 01-269 at ¶ 75 (released September 19, 2001) (stating that "our current rules do not require incumbent LECs to waive tariffed termination fees for carriers requesting special access circuit conversion");

(iv) Net2000 Communications, Inc. v. Verizon, FCC 01-381 (released January 9, 2002) (concluding that it was "reasonable for Verizon to request that Net2000 confirm that it wished to go ahead with the conversions before implementation" in light of Verizon's determination that the requested conversions would "result in relatively large termination liability and minimum period charges as a result of conversion of special access circuits being provided in accordance with Verizon's term tariff offering");

(v) Verizon WorldCom et al. Arbitration Decision, CC Docket Nos. 00-218, 00-249 and 00-251, Memorandum and Order, DA 02-173, ¶ 348 (released July 17, 2002) (stating that "[w]e reject AT&T's proposed language and decline to override the termination penalties contained in Verizon's special access tariff. AT&T voluntarily purchased special access services pursuant to Verizon's tariff and took advantage of discount pricing plans that offered lower rates in return for a longer term commitment. We will not nullify these contractual arrangements that AT&T previously accepted."); and

(vi) Bell South Alabama et al. 271 Order, WC Docket No. 02-150, Memorandum Opinion and Order, FCC No. 02-260, ¶ 212 (released September 18, 2002) (stating that "early termination penalties" are not an obstacle to a CLEC's "ability to convert special access circuits to EELs" and do not violate FCC rules).

The Order took two wrong turns, however, when it departed from these very same principles. First, it departed from its holding that it had no jurisdiction to interpret a federal tariff, by interpreting the very same tariff to preclude termination charges when Globalcom terminated its purchase of service under the interstate tariff and obtained service under the intrastate tariff. See Section II.B infra. Second, when it interpreted the identical language appearing in the termination charge provision of the Company's Illinois special access tariff, the Order decided that the termination charge provision should no longer apply where the customer terminates its purchase under the special access tariff but commits to purchasing the same facilities as an Enhanced Extended Link ("EEL") over the same or longer duration as the customer's original commitment to purchase special access service. See Section II.C. infra. To compound these errors, the Order then found Ameritech Illinois "culpable" under Section 13-514 for having defended the position that the termination charge provisions apply to conversions of intrastate special access services to EELs – the very same position that the FCC had upheld with respect to the identical interstate tariff, and that the Commission itself had upheld with respect to the Illinois tariff in Level 3 Communications. See Section II.D infra.

B. THE COMMISSION SHOULD REVERSE ITS DISCUSSION REGARDING THE APPLICABILITY OF TERMINATION CHARGES UNDER THE FCC'S SPECIAL ACCESS TARIFF TO CONVERSIONS OF INTERSTATE SPECIAL ACCESS CIRCUITS TO INTRASTATE SPECIAL ACCESS CIRCUITS

The Order (p. 41) correctly recognizes that FCC tariffs "exist exclusively under federal authority" and dismissed for lack of jurisdiction Globalcom's complaint as to the assessment of termination charges under Ameritech Illinois' interstate tariff when Globalcom seeks to terminate its interstate special access circuit in favor of an EEL. The Order then departed from that very jurisdictional principle when it interpreted the very same FCC tariff and held (at 15) that Ameritech Illinois "cannot impose termination charges when a customer purchasing special access circuits under its FCC tariff elects to take such circuits under the parallel Illinois tariff instead." This statement represents what is in effect a declaratory ruling on an issue that was not the subject of the Complaint in this proceeding and that the Commission lacked jurisdiction to entertain. The Commission's statement was also incorrect.

1. As The Order Itself Recognizes, The Commission Lacks Jurisdiction To Interpret An Interstate Access Tariff

The Order's statement as to the meaning and application of Ameritech Illinois' interstate access tariff is just that – a statement as to the meaning and application of an interstate tariff. The Order affects the amount of charges to be assessed under that tariff for services provided prior to the termination date, when the circuit was unquestionably interstate. But as the Order itself recognized, the Illinois Commerce Commission has no jurisdiction to rule on a dispute regarding the proper interpretation and application of an FCC tariff governing the provision of interstate special access services. Congress granted the Commission exclusive jurisdiction over "*all* interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (emphasis added). In so doing, Congress prescribed an exclusive and pervasive scheme for tariffing interstate services and for enforcing or modifying the terms and conditions of interstate tariffs. 47 U.S.C. §§ 201-202 (authorizing the FCC to define unjust and unreasonable charges and practices), 203 (requiring carriers to file tariffs for interstate services and prohibiting them from offering service on terms other than those in their tariffs), 204 (providing for FCC review of proposed tariffs), 205 (authorizing the Commission to prescribe just and reasonable charges), and 207-208 (establishing specific procedures and remedies for customers to assert claims that a carrier has failed to comply with the requirements of the Act). This Commission's attempt to interpret a federal tariff, and thus regulate interstate communications services, conflicts with and frustrates the congressional intent to establish the FCC's exclusive control over those services.

In light of the pervasive federal scheme, the Illinois Appellate Court has ruled:

> The Federal Communications Act of 1934 has given the Federal Communications Commission (FCC) exclusive authority to regulate interstate and international communications . . . this exclusive authority extends to interstate and foreign commerce in wire and radio communications and plenary jurisdiction over charges for such communications.

<u>Illinois Telephone Corp. v. Commerce Commission</u>, 260 Ill. App. 3d 919, 922 (1st Dist. 1994); see also <u>Kellerman v. MCI Telecommunications Corp</u>., 112 Ill. 2d 428, 442 (stating that "state attempts to regulate interstate carriers charges or services, would be preempted by the [federal Communications] Act"); <u>United States v. Western Electric Co</u>., 531 F. Supp. 894, 903 (1981)). Similarly, the Commission has ruled in prior cases that it is "compelled to follow" the "demarcation between interstate and intrastate jurisdiction," and that it may not exercise authority over interstate matters. Order, <u>Metrocom, Inc</u>., Ill. C.C. Docket 00-0234, p. 11 (Sept. 20, 2000). Consistent with this rule, the Commission itself has expressly held that "dedicated

access facilities classified as interstate are subject to the exclusive jurisdiction of the FCC." Illinois Bell Telephone Company v. AT&T Corp. and AT&T Communications, Ill. C.C. Docket 97-0624, p. 15 (Feb. 27, 1998).

The same jurisdictional principle governs this case. Whatever particular termination scenario is addressed, be it disconnection outright, termination with purchase of an EEL (the question presented by Globalcom's complaint), or termination coupled with purchase under the intrastate tariff (the scenario the Commission chose to address *sua sponte*), this case involves a dispute over what charges Ameritech Illinois may properly bill under its interstate special access tariff, for use of a circuit during the period it was classified – based on Globalcom's own certification – as interstate. The Commission had no jurisdiction to reach that issue, and it recognized as much when it dismissed the claim that *was* raised by Globalcom's complaint (whether interstate termination charges apply when the carrier obtains an EEL).

The Order articulated two reasons for considering whether intrastate charges apply under the federal tariff when the carrier terminates its interstate circuit and purchases under the intrastate tariff. Neither rationale provides a jurisdictional basis for that decision. First, the Commission stated that it was "free to reach its own conclusion on this issue" because "[f]ederal authorities have simply never addressed" the precise situation involving conversion to the intrastate tariff. Order, at 15. But that is an argument about the *merits* of the Commission's decision, not its authority to decide the issue in the first place. The FCC's jurisdiction over interstate communications is exclusive, and that demarcation applies with equal force to all issues at all times. Questions about interstate communications must go to the FCC every time they are raised, including the first. That a question is one of first impression means, if anything, that the federal interest in deciding it is of even more force.[3]

Further, the Commission was wrong not only in its underlying approach (that it could reach an issue subject to the FCC's exclusive jurisdiction so long as the FCC had not addressed it) but in its application of that approach – because the applicability of termination charges in the federal/state conversion scenario *has* been addressed by the federal authorities. In 1990, when the FCC ruled that a service could be classified as interstate only if more than ten percent of the traffic on the service is interstate, Ameritech Illinois waived, but only for a period of three months, OPP termination charges for customers required to change the jurisdictional status of their services from the federal to the state tariff because the services did not meet the ten percent threshold. Ameritech FCC No. 2, section 2.3.12(B). The FCC denied carrier petitions to reject or suspend those tariffs, explaining that Ameritech Illinois and other LECs had modified their tariffs to allow customers a reasonable time to change the jurisdiction of their services without termination liability. Local Exchange Carriers' Revisions to Tariffs to Implement Section 36.154(a) of the Commission's Rules, 5 F.C.C. Rcd. 3248 (1990). The exemption allowing changes to jurisdiction without termination liability has expired, and no other period has been allotted.

The Order's citation to section 251(d)(3) of the federal Act is equally misplaced. That Section discusses state commission authority to promulgate policies with respect to network unbundling and interconnection obligations that are consistent with the requirements of Section

[3] There are many federal tariff provisions that the FCC has not yet addressed. If each state has authority to adjudicate disputes and adopt its own interpretation of those provisions, customers could engage in forum-shopping, choosing among the various state commissions to find the most favorable "first impression" of tariff provisions. The resulting (improper) state commission decisions could require providers of interstate services to apply different interpretations of the same tariff provisions in different states.

251 of the 1996 Act. The interstate special access service offered under FCC Tariff No. 2, however, is a service over which the FCC has exclusive jurisdiction under Section 201 of the Communications Act. 47 U.S.C. § 201. Section 251(i) of the 1996 Act provides that nothing in Section 251 "shall be construed to limit or otherwise affect the [FCC's] authority under Section 201." 47 U.S.C. § 251(i); First Report and Order, ¶ 358 ("our authority to regulate interstate access charges remains unchanged by the 1996 Act"). In accordance with Section 251(i), the FCC has explicitly "reject[ed] the argument" that Section 251 "place[s] the administration of interstate access charges under the authority of the states." First Report and Order, ¶ 358. Indeed, the Commission itself recognized this principle elsewhere in its Order, when it recognized that "subsection 252(d)(3) has no application in this instance" because whatever state law the Commission seeks to implement, it does not have "authority over the thing to which the our remedy would apply (i.e. the pertinent federal tariffs)." Order, at 41.

2. The Commission's Interpretation Is Wrong

Over and above the Commission's lack of jurisdiction to even address the assessment of termination charges under the federal tariff in the first place, the Commission's decision on the merits was wrong. First, there is no evidence to support the Order's holding. Ameritech Illinois witness Sandra Douglas testified that charges for early termination for special access service are not waived under the terms of the FCC tariff if a customer seeks to change the jurisdiction of the special access service from interstate to intrastate. As Ms. Douglas explained, such a change is a termination of service, because the customer would be terminating its agreement to take service out of the interstate tariff and requesting the establishment of service out of the intrastate tariff. (Am. Ill. Ex. 3.0 (Revised), p. 17).[4]

That testimony accords with the plain meaning of the term "termination of service": Logically, the only "service" that a tariff could reference is the "service" that is being provided under that tariff, because the existence of any other service could only be hypothetical. "Converting" a special access service from interstate to intrastate means that the service provided via the federal tariff ends and a different service, foreign to the original tariff, begins: an intrastate access service. The history of the federal tariff confirms the plain reading that a termination applies under the federal tariff even if the customer concurrently purchases the same circuit under the Illinois tariff. As noted above, the federal tariff established a limited exemption for such "conversions" during the transitional period following the implementation of new FCC rules for classifying circuits as interstate vs. intrastate. The fact that such an exemption was necessary demonstrates conclusively that termination charges would apply in the absence of an exemption; the fact that the exemption has long since expired demonstrates that termination charges apply now.

Second, the Order's stated premise reflects a fundamental misconception about termination charges. In the Commission's view, the termination charge was designed to compensate Ameritech Illinois for the loss of *future* charges after the date of termination. Hence, the Order stated that a termination charge would be inappropriate where "the customer concomitantly commits to the purchase of . . . service under another tariff" and the provider still

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4 While Globalcom complained that Ms. Douglas' testimony represented a change in Ameritech Illinois' position, Globalcom did not present any testimony contradicting Ms. Douglas' interpretation of the FCC's tariff. Furthermore, as the Company discussed in its Reply Brief, Ms. Douglas' testimony did not, in fact, reflect a reversal of the Company's position. (Am. Ill. Reply Br., pp. 21-22; Am. Ill. Ex. 8.0).

"receives a revenue stream" after the termination date. Order, at 12. But the termination charge is not designed to address the loss of revenues *after* termination at all. Instead, as described above, it adjusts revenues received *before* the termination date, to reflect the fact that those revenues reflected a discount to which the customer was not entitled.[5] Any "revenue stream" for services provided after termination (intrastate circuits or EELs) stands on its own footing.

To follow our previous illustration, where Carriers A and B each make different term commitments but both terminate their interstate circuit after a year: With a termination charge, A and B both ultimately pay the same amount for the same service for the year, and that book is closed; if A and B purchase service under the intrastate tariff after the year is up, each pays the same price for that service that any other carrier would pay at that time. *Without* a termination charge, however, A and B do not pay the same amount for the same service in the first year: Instead, A would retain its discount for making a 60-month term commitment – even though it did not honor that commitment – while B, the carrier that correctly made and honored a one-year commitment, would pay more. The result is a classic arbitrage: an opportunity for a carrier to obtain the same service for the same term but pay less, simply by overstating its term commitment up front. The carrier would have no incentive to give the proper commitment; rather, its incentive would be to enter into the longest term OPP plan available, at the most discounted rates, because there would be no risk of paying termination charges in the event that the carrier converts those circuits to the intrastate tariff (and from there to an EEL, as discussed in Section II.C below) prior to the expiration of the OPP plan.

The Order also incorrectly applied its erroneous premise. According to the Order, a termination is improper because the future revenue stream under the Illinois tariff is equivalent to

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[5] Ameritech Illinois does not contend that the Commission's order would have been correct if the termination charge had been designed to compensate for future revenues. That situation, however, is not presented here.

that of the FCC tariff and thus the purchase under the Illinois tariff is merely a "jurisdictional" change. The Order itself belies the premise that jurisdictional differences can be ignored. Even though the language of the FCC and Illinois tariffs *is* identical, the Order interprets the Illinois tariff to preclude termination charges in a situation where such charges are applied under the FCC tariff (namely, the "conversion" of access to EELs), and that decision makes the practical terms for the interstate and intrastate service differ quite substantially. See Section II.C infra.

Finally, the Order erred in its conclusion that application of termination charges under the FCC tariff would "in its effect, be a violation of Illinois law." The Order does not explain what "Illinois law" would be violated. Presumably, the Order is referring to its analysis of "conversion" to EELs and its conclusion that 13-801 mandates the maximum availability of EELs. However, jurisdictional conversions (from one access tariff to another) present no issue of access to UNEs and, therefore, 13-801 is inapplicable.

3. The Order Violates The Filed Rate Doctrine

The preceding section demonstrates that (i) termination charges result in equal treatment for carriers purchasing the same circuit for the same period while (ii) the Order's preclusion of such charges results in *un*equal treatment, with the carrier that overstates its term commitment benefiting from its error (or outright dishonesty). That result makes clear another legal infirmity in the Order: its violation of the filed rate doctrine.

The legal relationship between Ameritech Illinois and interstate special access customers is defined by tariff, and "[t]he rights as defined by the tariff cannot be varied." Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 (1986). Accordingly, a customer "can claim no rate as a legal right other than the filed rate." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-52 (1951). One important purpose of the doctrine is to prevent discriminatory treatment among similarly situated customers. The doctrine therefore precludes any claims that would allow a customer to avoid its tariff obligations on any ground, or to effectively receive service at a lower rate than all other similarly-situated customers. AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998) ("[T]he policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at the heart of the common-carrier section of the Communications Act.").

Under Ameritech Illinois' federal special access tariff (and its Illinois counterpart) the "filed rate" for a given circuit is based on its term, and the rate for a 60-month term is lower than the rate for a 12-month term. In our illustration, Carriers A and B both purchased under the tariff for 12 months, so both should pay the 12-month rate – and so long as A pays a termination charge, it ultimately does pay the same 12-month rate as B. The tariffed termination charge ensures that these similarly situated customers pay the same tariffed rate for the same service. But by precluding such termination charges in the case of "jurisdictional conversions," the Order means that Carrier A does *not* pay the filed rate for its 12-month term, and that "similarly situated customers pay different rates for the same services." Central Office Telephone, 524 U.S. at 223. That result violates "the policy of nondiscriminatory rates" that "lies at the heart of the common-carrier section of the Communications Act." Id.

C. THE ORDER'S HOLDING AS TO THE TERMINATION LIABILITY PROVISION OF THE ILLINOIS SPECIAL ACCESS TARIFF SHOULD BE REVERSED

The Commission should also vacate its determination that the termination liability provision of the Company's Illinois special access tariff does not apply to the conversion of special access circuits to EELs. The Illinois special access tariff contains exactly the same language governing termination charges as its FCC counterpart – which unquestionably does permit the assessment of termination charges in the exact same circumstances. That the Commission would construe the same language to preclude termination charges on the Illinois side – while upholding the assessment of such charges on the federal side – is arbitrary and capricious.

As the Order correctly recognizes, its determination is also inconsistent with the Commission's prior decision in Level 3 Communications (which upheld the imposition of termination charges under the Illinois tariff), as evidenced by its statement that "it is time to move past Level 3 Communications, Inc. . . ." (Order, at 13.). The reference to Level 3 Communications is particularly ironic, given that the order in that case stated that there is "*no* reason at this point to take a fresh look at termination charges," and that "if the FCC felt a fresh look was mandated or appropriate, it would have so stated in its UNE Remand." Order, Docket 00-0332, p. 24 (August 30, 2000). As also discussed, the FCC has considered the termination charge issue on numerous occasions and expressly concluded that a "fresh look" at the issue of whether termination charges should apply to special access to EEL conversions is, in fact, neither "mandated" nor "appropriate." The policy underlying the FCC's position (i.e., that it is inappropriate to "nullify agreements under which a carrier voluntarily purchased special access services pursuant to [a] filed tariff and took advantage of discount pricing plans that offered lower rates in return for a longer term commitment")[6] applies equally to special access services purchased by Globalcom under the discount pricing plans offered under Ameritech Illinois' intrastate tariff as it does to the special access circuits purchased by Globalcom under the identical discount pricing plan provisions of the FCC tariff.

[6] Verizon/WorldCom et al., ¶ 348.

The Order's incorrect conclusion that it is time to "move past" Level 3 Communications was founded on three separate errors: (1) as with its determination regarding conversions from the interstate tariff to its intrastate counterpart discussed in Section II.B, the Commission erroneously conceived termination charges as compensation for lost *future* revenue; (2) the Commission misconstrued the language of the intrastate tariff; and (3) the Commission purported to enforce Section 13-801 of the PUA, but instead misconstrued that statute. Moreover, the result reached by the Order effectively gives purchasing carriers a license to use the Illinois tariff as a means to circumvent termination charges under the FCC tariff, and also violates the filed rate doctrine.

1. The Order Fundamentally Misconceives The Nature And Purpose Of Termination Charges.

As with its interpretation of the FCC tariff, the Order's determination as to the Illinois tariff is founded on a misconception of the nature and purpose of termination charges. As the Order saw it, the termination charge represents compensation for lost revenue *after* the termination date, and should not apply when the terminating carrier purchases an EEL because "[t]he continuing revenue stream also insulates the provider against additional economic loss" and "the forward looking cost of service is accounted for through the TELRIC cost determination methodology" applicable to the pricing of UNEs. (Order, at 12.) Considering the termination charge as "forward looking" led the Commission to conclude that such a charge does "not appropriately address the continuing purchase of the same facilities for the balance of the term commitment" and would inhibit the carrier's forward-looking decision to obtain UNEs. But that is wrong. The termination charge under the Illinois tariff, like the termination charge under its FCC counterpart, is a backward-looking true-up of *past* revenues during the period of time for which the carrier actually took service under the tariff. It has no bearing at all on charges for the unused portion of the term.[7]

Consider again the example of Carriers A and B. This time each purchases the same access circuit under the Illinois tariff for a year, and obtains an EEL thereafter; the only difference is that in purchasing the access circuit A makes an up-front term commitment of five years, while B correctly states its term commitment as one year. During the first year, A pays less for its access circuit than B; Ameritech Illinois would assess a termination charge to A, and with that charge the end result for the first year is the same for A and B. Going forward, A and B would pay the identical UNE rates for their EELs. A and B receive the same treatment, and thus there is no possible disincentive and no cause for Commission concern.

Without a termination charge, though, A would pay less for its access circuit in the first year than B, and thus less overall. As with the FCC tariff discussed in Section II.B, A's discount did not result from any substantive difference in the service provided or the period for which it was provided. The only difference was that A incorrectly overstated its term commitment when it first purchased its intrastate circuit. Again, the result is a classic arbitrage: A is rewarded for its error or even for gaming the regulatory system. The Order does not remedy any disincentive; rather, it creates an affirmative incentive for carriers to overstate their term commitment in purchasing access circuits.

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[7] Over and above its erroneous premise that termination charges were forward-looking, the Commission erred in its reasoning that the TELRIC-based rates for EELs would "insulate [Ameritech Illinois] from additional economic loss." (Order, p. 12). TELRIC rates are not based on actual or embedded costs, but are based on a network that does not actually exist today. (Am. Ill. Ex. 6.0, p. 4). In fact, the TELRIC rates currently effective in Illinois are substantially below actual costs. (Tr. 359).

2. The Order Conflicts With The Plain Language Of The Illinois Tariff.

Given that the Order's holding on termination charges under the Illinois tariff is, by its own admission, contrary to FCC decisions under the identical language of the FCC tariff, and given the Order's misconception of the nature of termination charges, it is not surprising that the Order's holding is contrary to the plain language of the Illinois tariff.

The Order suggests that the "conversion" of an access circuit to an EEL does not constitute a "termination" of access service within the meaning of the tariff because it represents a commitment by the customer to "concomitantly . . . purchase . . . the same (from a functional standpoint) service under <u>another tariff</u>, using the same systems and facilities of the provider, over no less than the same term applicable to the terminated service." (Order, p. 11) (emphasis added). But the Illinois access tariff provides that a customer which purchases special access service out of the tariff under a term discount plan ("optional payment plan" or "OPP"), and terminates such service "prior to the expiration of the OPP term," will be liable for termination charges. Logically, the term "service" as used in a provision of a particular tariff does not refer to all service in general, or to some other service; rather, it refers to the "service" that is being provided under that tariff. The plain meaning of the word "terminate" means to "bring to an end." <u>Random House Dictionary of the English Language, College Edition</u>, Random House, New York (1968). Thus, the plain meaning of the phrase "termination of service prior to the expiration of the OPP term" means to bring to an end the purchase of special access service out of the Illinois special access tariff prior to its conclusion of the OPP term for which the customer committed to purchasing such service.

When a CLEC elects to "convert" a special access service to a combination of UNEs, the CLEC brings to an end, or "terminates," the purchase of that special access service out of the special access tariff and begins to purchase something else: a combination of unbundled network elements under the terms of either an ICA or a UNE tariff. Accordingly, under the plain language of the Illinois tariff, a conversion of special access service to EELs constitutes a "termination of service." The reference to "termination of service" in the Illinois special access tariff necessarily refers to the termination of service purchased from that tariff, not from "another tariff." Moreover, the law is clear that the provision of a UNE does not constitute the provision of "service." As the FCC has explicitly stated, "when interexchange carriers purchase unbundled elements from incumbent LECs, they are not purchasing exchange access 'services.' They are purchasing a different product, and that product is the right to exclusive use of an entire element." First Report and Order, ¶ 358. Accordingly, when a CLEC converts special access services to a combination of unbundled network elements, such conversion constitutes, by definition, a termination of special access "service" and the substitution for that "service" of a "different product . . . the right to exclusive access or use of entire element[s]." First Report and Order, ¶ 358.

Thus, while the Order casts itself as an "interpretation" of the tariff language, it is, in reality, a modification of the plain language of the tariff. The Order rewrites the tariff language to state that a termination charge shall apply upon the "termination of service prior to the expiration date of the OPP term except when the CLEC agrees to purchase an existing combination of UNEs in substitution of the special access service being terminated for the remainder of the term." This case was not initiated for the purpose of reviewing proposed amendments to the Company's special access tariff. To the contrary, Globalcom repeatedly emphasized that it was seeking only an order interpreting the tariff or, alternatively, requiring Ameritech Illinois to waive its otherwise applicable termination charges on a conversion of special access circuits to UNEs. Accordingly, this is not an appropriate proceeding to order a modification of the tariff.

3. The Order's Citation To Section 13-801 Is Misplaced.

In concluding that it is time to "move past" Level 3 Communications, the Order (at 13) stated that the Illinois tariff's termination liability provisions should be "scrutinized" through the "lens of our legislative mandate" in Section 13-801. Section 13-801, however, does not address the issue of termination charges. Accordingly, there should be a presumption that the General Assembly did not intend to change the law (as expressed in Level 3 Communications) with respect to the applicability of tariffed termination charges to special access conversions. Illinois Bell Telephone Company v. Allphin, 93 Ill.2d 241, 253 (1982) (a "consistent and contemporaneous construction by those charged with administration of the Act, a construction which went unchallenged by the legislature, is persuasive"). Indeed, the General Assembly went out of its way to make it clear that Section 13-801 does not constitute a change in Illinois law with respect to special access circuits, stating that "nothing [in Section 13-801] is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdictional authority in this area." 220 ILCS 5/13-801(j). [8]

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[8] The Order states that it is not citing 13-801 for the requirement to convert, only for the establishment of terms and conditions on an independent obligation to convert (Order, at 18). The independent obligation comes from the ICA and the tariff, according to the Order. But ultimately, it comes the FCC's UNE Remand and Supplemental Order Clarification. And the FCC's policy is to allow the termination charges for conversions. Further, the Commission's reading of the statute would as a practical matter read Section 13-801(j) out of the statute.

Further, the Order's concern that termination charges are contrary to the general policy of promoting competitive entry is unfounded. As demonstrated above, termination charges do not affect a carrier's forward-looking decision to purchase an EEL; the carrier pays the same price for that EEL that any carrier would. The termination charge only affects the carrier's backward-looking error in stating its term commitment, and trues up a past discount to which the carrier was not entitled.

4. The Commission's Interpretation Improperly Circumvents The Federal Tariff And Is Pre-empted.

The Order reached three overall results with respect to termination charges: (A) it upheld termination charges under the FCC tariff where the carrier then obtains an EEL; (B) it prohibited termination charges under the same FCC tariff where the carrier then obtains service under the Illinois tariff; and (C) it prohibited termination charges under the identical Illinois tariff in the same situation where such charges were upheld under the identical FCC tariff – namely, where the carrier obtains an EEL. As demonstrated in the preceding sections, holding (A) was clearly correct, and holdings (B) and (C) were incorrect – as demonstrated by the conflict between the latter holdings and holding (A). But that is not the sole conflict. At a practical level, the Order's decision to preclude termination charges on interstate/ intrastate conversions gives Globalcom a blueprint for *circumventing* termination charges on interstate/EELs conversions, even though such charges have clearly been upheld by FCC precedent and by the Order itself.

The Commission's holding (B) – that termination charge provisions do not apply under FCC Tariff No. 2 when a carrier seeks to terminate service under that tariff and purchase service under the Illinois special access tariff -- would not have had much practical effect absent holding (C). In accordance with the requirements of the Commission's <u>Fourth Interim Order</u> in Docket 83-0142 (November 23, 1983), the terms, conditions, and rates of the Illinois special access tariff mirror those of the FCC tariff. In this case, however, the Order effectively "breaks" that mirror by ruling that the termination liability provisions of the Illinois tariff should be interpreted and applied in a manner differently than the termination liability provisions of the FCC tariff – namely, the Order states that termination charges do not apply for termination of an *intra*state circuit coupled with purchase of an EEL, even though it upholds such charges when the carrier terminates an *inter*state circuit and obtains an EEL. *See* Section II.C *infra*.

By "breaking" the mirror in this manner, the Order creates an incentive for a carrier, such as Globalcom, to evade the termination charges that unquestionably apply for termination of an *inter*state circuit, by dividing that termination into two steps. First, the carrier would "convert" its special access circuits from FCC Tariff No. 2 to the Illinois tariff; then, the carrier would "convert" the Illinois circuit to an EEL. In substance, those two steps lead to the exact same result as a direct termination under the FCC tariff coupled with purchase of an EEL. Yet even as the Order upholds termination charges in the latter "direct termination" scenario, it states that such charges do not apply to either step of the former "indirect termination" scenario. In other words, the Order sets up yet another arbitrage: an opportunity for a carrier to avoid payment simply by changing the form, not the substance, of its actions. The very purpose of "mirroring" is to eliminate the incentive and opportunities that carriers may have to engage in tariff "arbitrage" through the incorrect reporting of the percentage of interstate and intrastate traffic. (Am. Ill. Ex. 3.0, p. 14).

Based on the Order's holding that the termination liability provision of ICC Tariff No. 21 does not apply to special access conversions, a carrier would have an incentive to engage in tariff arbitrage by (i) underreporting its percentage of interstate traffic in order to obtain special access service out of the Illinois tariff and (ii) overstating its term commitment to take full advantage of a discount to which it is not entitled. The Commission should accordingly grant rehearing and vacate the challenged aspects of its decision. At a minimum, the Commission should reduce the potential for arbitrage by holding that the circuits presented by Globalcom in this case are interstate – Globalcom alleged that they are, and presented no evidence to the contrary in this proceeding.

5. The Order Violates The Filed Rate Doctrine.

As demonstrated in Section II.B.3 above, the Order's preclusion of termination charges under the FCC tariff (when the customer concurrently purchases the same circuit under the Illinois tariff) results in discriminatory rates for carriers paying the same service for the same term, by giving preferential treatment to the carrier that misstated its term commitment up front. The preceding sections here demonstrate that the Order's preclusion of termination charges under the identical Illinois tariff (when the customer concurrently purchases an EEL) yields the same discriminatory result. In our illustration, Carriers A and B purchased the same service for the same term. Under the Order, however, Carrier A would *not* pay the filed 12-month rate; it would pay a lower rate, based solely on its misstatement of its term commitment. Here too, then, the Order means that "similarly situated customers pay different rates for the same services" and therefore violates the policy of nondiscrimination served by the filed rate doctrine. Central Office Telephone, 524 U.S. at 223.

D. THERE IS NO LAWFUL BASIS FOR CONCLUDING THAT AMERITECH ILLINOIS VIOLATED SECTION 13-514 WITH RESPECT TO ITS POSITION CONCERNING TERMINATION CHARGES

As discussed in Subsection C above, Ameritech Illinois strongly disagrees with the Order's interpretation of the Illinois tariff. Even if the Commission maintains that interpretation, however, there is no lawful basis for a finding that Ameritech Illinois violated Section 13-514.

As the Commission has previously emphasized, to sustain a claim that a carrier's conduct violates Section 13-514, a simple allegation that the conduct constitutes a "prohibited action" under Section 13-514 is not sufficient. Rather, the complainant has the burden of proving that "the particular transgression was unreasonable in light of all of the relevant surrounding circumstances." 21st Century Telecom of Illinois, Inc., Docket 00-0219, pp. 26-27, 29 (June 15, 2000). Here, the "transgression" that Ameritech Illinois is alleged to have committed is taking the position that a conversion of special access services to UNEs prior to the expiration of the OPP term under which the service was purchased constitutes a "termination of service prior to the expiration date of the OPP term," triggering liability for termination charges under the terms of the Illinois tariff. The Order makes no finding that Ameritech Illinois acted unreasonably in maintaining and defending that position.

Nor could such a finding be sustained. There is and could be no evidence that Ameritech Illinois "acted unreasonably" in maintaining and defending its position regarding the applicability of the Illinois tariff's termination liability provision. Until now, the only Illinois Commerce Commission decision to address the issue was Level 3 Communications, a decision that fully supports the Company's position. In that case, as previously discussed, the Commission expressly rejected an argument similar to that made by Globalcom in this case that the conversion of special access services to EELs does not constitute a termination of service. Moreover, in reaching that decision, the Commission expressly relied on the FCC's position that, in a conversion scenario, "the CLEC should remain responsible for termination fees," and stated that "if the FCC felt a fresh look [at termination charges] was mandated or appropriate, it would have stated so in its UNE Remand." Order, Docket 00-0332, p. 24. As previously discussed, and as the Order itself recognizes, the FCC has revisited this issue on numerous occasions since the Level 3 Communications Order, and each time the FCC has rejected arguments that a "fresh look" at the issue is mandated or appropriate.

Accordingly, there is no basis whatsoever for a finding that Ameritech Illinois has acted unreasonably in maintaining that, under language of the Illinois special access tariff (like the identical language of the FCC tariff), the "conversion" of a special access service to EELs prior to the expiration of the term for which the customer committed to purchase the service under the tariff will trigger the payment of termination charges. Ameritech Illinois disagrees with the Commission's to revisit its decision in Level 3 Communications, but at a minimum a revised decision should only be applied prospectively.[9] The Order's determination that Ameritech Illinois be held legally "culpable" under Section 13-514 is essentially a decision that Ameritech Illinois be held liable for failing to predict with clairvoyance a change in policy that the Commission announced for the first time in its Order in this case. The Order's determination in this regard is arbitrary and capricious and should be rejected.[10]

[9] The Order's claim that it is applying its view of the Ameritech's termination charges prospectively (Order, p. 16) is untenable given the immediately following paragraph that indicates that the Company is being required to pay compensatory damages for circuits purchased after December 27, 2001. That is clearly a retroactive application of the ruling. Moreover, that remedy is based on finding that the Company violated 13-514 during the period prior to the issuance of this order by taking the position that termination charges apply. That too is a retroactive finding.

[10] The Order's finding that intrastate termination charges violate the parties' interconnection agreement and that in view of Ameritech Illinois' "familiarity" with the ICA it should have known that termination charges were not applicable under the ICA is neither here nor there. The agreement allows Ameritech Illinois to charge "applicable" termination charges. The issue is what charges are "applicable," and given Ameritech Illinois' familiarity with all of the FCC Orders and the Commission's Level 3 decision that the termination charges were clearly "applicable." The Order is effectively charging Ameritech Illinois with "familiarity" with the Commission's future ruling on the issues in this case.

III. COLLOCATION

A. INTRODUCTION

Globalcom operates under a Commission approved interconnection agreement ("ICA") which provide Globalcom with access to unbundled network elements ("UNEs"), including unbundled lops and dedicated transport facilities (both interoffice and entrance facilities). That ICA provides that, if the loop and transport facilities for which Globalcom requests access are not already combined, it is the responsibility of Globalcom (not Ameritech Illinois) to perform the work of combining those UNEs to create "new" EELS. (Tr. 155-57, 165; Am. Ill. Ex. 1.0, p. 24). In the Joint Petition requesting approval of the ICA, filed on June 6, 2001, Globalcom agreed that implementation of the ICA "will promote facilities based local exchange competition and enhance Globalcom's ability to provide Illinois telecommunications users with a facilities based competitive alternative for local telephone services." (Am. Ill. Cross Ex. 2).

In December 2001, Globalcom, for the first time ever, requested that Ameritech Illinois provide new EELs for Globalcom's use as substitutes for the purchase of new special access services. Because Globalcom had no contractual right to make such a request, it sought to order the new EELs under the terms of Ameritech Illinois' Interim Compliance Tariff. That tariff, which became effective on September 18, 2001, was designed as an interim measure to enable the Company to provide CLECs with certain new UNE-P and EEL combinations identified in Section 13-801(d)(3) of the Act, pending Commission review of Ameritech Illinois' proposed permanent 13-801 compliance tariff in Docket 01-0614. Under the Interim Compliance Tariff, an EEL was defined as a new combination of unbundled local loop and unbundled dedicated transport, with the transport terminating in a CLEC's collocation arrangement. As will be discussed, the Interim Compliance Tariff's definition of a new EEL was based upon a reasonable and good faith interpretation of the requirements of Section 13-801(d)(3) of the Act.

Section 13-801(d)(3) does not require Ameritech Illinois to substitute combinations of UNEs (including EELs) for special access services (220 ILCS 5/13-801(j)). Despite this fact, and despite the fact that the ICA expressly relieves Ameritech Illinois from any obligation to provide new EELs, Ameritech Illinois would have allowed Globalcom to purchase new EELs, as defined in the Interim Compliance Tariff. Because Globalcom had not established a collocation arrangement with Ameritech Illinois, however, it was unable to take advantage of the new EELs offered in the Interim Compliance Tariff.

In its Amended Complaint, filed May 24, 2002, Globalcom alleged that the requirement that new EELs terminate in a collocation arrangement violates Section 13-514 and requested that Ameritech Illinois be directed to order new EELs without establishing a collocation arrangement. The issue raised by Globalcom in its Complaint, however, had already been fully litigated, and was awaiting resolution, in Docket 01-0614. In its Order on Reopening in Docket 98-0396, issued on April 30, 2002, less than a month before Globalcom filed its Complaint, the Commission expressly rejected Globalcom's proposal to remove the collocation requirement from the Interim Compliance Tariff, stating that "issues relating to collocation requirements will be better resolved in Docket 01-0614." Order on Reopening, Docket 98-0396, p. 25 (April 30, 2002). Accordingly, Globalcom's attempt to raise the issue in its Complaint was inappropriate and should have been dismissed.

In its Order in Docket 01-0614, issued on June 1, 2002,, the Commission directed the Company to remove the collocation requirement from its EELs tariff. Ameritech Illinois filed amended tariffs in compliance with the Order on July 11, 2002. (Am. Ill. Ex. 9.0).

Accordingly, Globalcom has already received the relief that it requested. Moreover, although Ameritech Illinois strongly believes that the Commission decided this issue wrongly in Docket 01-0614, and has appealed that decision, the Company did not request that the decision be reversed in this proceeding. Accordingly, this issue should have been deemed to have been resolved.

In the Order, however, the Commission went beyond the decision that it made in Docket 01-0614, which required Ameritech Illinois to revise its tariffs to remove the collocation requirement on a <u>prospective</u> basis. The Order finds that (i) Ameritech Illinois violated Section 13-514 by including the collocation requirement for new EELs in the Interim Compliance Tariff in the first place and (ii) Ameritech Illinois should be punished by reimbursing Globalcom for "damages" allegedly caused during a portion of the time that the tariff was in effect. For the reasons discussed below, the Commission's decision is arbitrary and capricious, unsupported by adequate findings of fact and substantial evidence in the record, contrary to state and federal law, and violative of the Supremacy Clause and the First Amendment of the United States Constitution.

B. THERE IS NO EVIDENTIARY BASIS TO CONCLUDE THAT THE INTERIM COMPLIANCE TARIFF WAS ANTICOMPETITIVE

As support for this decision, the Order accepts at face value Globalcom's allegation that the Interim Compliance Tariff "was designed to, and did, impede competition" and, based on those allegations, concludes that Ameritech Illinois' conduct in filing that tariff constitutes a <u>per se</u> violation of Section 13-514. Not only is this finding unsupported by the evidence, it is grossly unfair. By voluntarily filing the Interim Compliance Tariff, Ameritech Illinois, with the cooperation of its Commission Staff and express permission of the Commission, went out of its way to make available to CLECs new UNE combinations (including UNE-P and EELs) that would not otherwise have been available prior to a full review of the Company's proposed 13-801 compliance tariff amendments in Docket 01-0614. Ameritech Illinois' conduct should be commended, not punished.

The evidence shows that the Interim Compliance Tariff was one part of the Company's good faith efforts to comply with Section 13-801, which became effective on June 30, 2001. Section 13-801 was not "self-activating." To the extent that the provisions of Section 13-801 required Ameritech Illinois to make available products (such as the new UNE combinations specified by Section 13-801(d)(3)) which were not then required under federal law, these provisions were also subject to the tariffing requirements of Section 13-501(a) of the Act, which provides that:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided.

220 ILCS 5/13-501(a).

In accordance with Section 13-501(a), Ameritech Illinois initially filed proposed tariff amendments on July 2, 2001, the first business day following the effective day of Section 13-801. Because the provisions of that new statute were not unambiguous, Ameritech Illinois understood that the interested parties would probably have differences of opinions with regard to the proper interpretation of Section 13-801 and the nature of the tariff amendments required to comply with that statute. Accordingly, the Company also understood that the Commission would want to investigate the terms of the proposed compliance tariff amendments. However, in order to allow CLECs the opportunity to take immediate advantage of new offerings contained in that tariff, including new UNE combinations, the Company advised the Commission that it would be willing to put the tariff into effect immediately, during the pendency of a tariff investigation. The Company pointed out that this procedure would not prejudice any party because the tariff amendments did not increase rates and did not restrict the availability of any services, features or UNEs that were available prior to the amendments.[13]

At the request of the Commission Staff, however, the Company withdrew and refiled the amended tariff sheets on two occasions in order to extend the effective dates of those tariff sheets and provide Staff with more time to review the tariff amendments. (Am. Ill. Ex. 4.0, pp. 8-9). After the Company withdrew and refiled the tariff amendment for the second time, on September 13, 2001, the Commission entered an Order suspending the effectiveness of the tariff sheets and initiated Docket No. 01-0614. (Am. Ill. Ex. 4.0, p. 9).

Because of the delay in making the proposed permanent tariff sheets effective, Ameritech Illinois took the initiative to develop an Interim Compliance Tariff and requested that it become effective on less than 45 days notice so that CLECs could at least have the opportunity of taking advantage of the new UNE-P and EEL combinations identified in the Draft I2A (which is incorporated by reference in Section 13-801(d)(3)) pending the completion of Docket No. 01-0614. The Commission reviewed the Interim Compliance Tariff and allowed it to go into effect upon a finding of good cause in an Order issue on September 18, 2001 in Docket No. 01-0586. (Id.).

[13] Ameritech Illinois also offered to enter into an Illinois legislative amendment to existing interconnection agreements that would allow CLECs to obtain the benefits of the proposed tariff amendments even sooner than the effective date of the tariff amendments. The Illinois legislative amendment incorporates by reference the terms of the tariff amendments, as they may be modified from time-to-time by changes accepted or approved by the Commission. By its terms, an executed legislative amendment would have become effective 5 days after filing with the Commission unless otherwise directed by the Commission. No CLEC elected to enter into the legislative amendment. (Am. Ill. Ex. 4.0, p. 8).

The facts recited above are unrebutted. Thus, the undisputed evidence shows that the Interim Compliance Tariff was "designed to, and did," make available to CLECs, including Globalcom, UNE combinations that would not otherwise have been available prior to the completion of Docket 01-0614 and the filing of tariffs complying with a final Order in that case. In light of these circumstances, there is no logical or lawful basis for the Order's conclusion that Ameritech Illinois' conduct in filing the Interim Compliance Tariff was "anticompetitive" in any respect.

C. THE ORDER'S DECISION TO GRANT GLOBALCOM RETROACTIVE RELIEF FROM THE COLLOCATION REQUIREMENT OF THE INTERIM COMPLIANCE TARIFF IS CONTRARY TO THE TERMS OF THE INTERCONNECTION AGREEMENT

As Globalcom admitted, Section IX.3 of the ICA between Globalcom and Ameritech Illinois, expressly states that, if the unbundled loop and unbundled transport elements desired by Globalcom "are not already combined, then it is Globalcom's responsibility to combine them" (emphasis added). (Tr. 164-65; Globalcom Response to Ameritech Illinois' Data Request Item 20). Thus, as the Order (p. 38) correctly recognizes, the the ICA does not require Ameritech Illinois to provide new EELs under any circumstances, with or without a collocation requirement.[14]

Notwithstanding the undisputed terms of the ICA, the Commission concludes that Ameritech Illinois impeded Globalcom's ability to compete, in violation of Section 13-514, by not making new EELs available to Globalcom without a collocation requirement under the

[14] The Order states that because the "parties did not supply the entire ICA for the record," the Commission "cannot evaluate the foregoing language [of Section IX.3.1] in context or interpret it in light of other contract provisions." (Order, p. 38). However, with respect to the issue before the Commission (i.e., whether Ameritech Illinois has an obligation under the ICA to perform the work of combining UNE loop and dedicated transport facilities on behalf of Globalcom to create new EELs), Globalcom admitted that Ameritech Illinois has no such obligation and that, under Section IX.3.2, the responsibility for combining UNEs to create new EELs is Globalcom's. Accordingly, there is nothing further for the Commission to "interpret." If the Commission concludes that it must have the entire ICA in the record to evaluate Ameritech Illinois' arguments regarding the ICA, however, it should grant rehearing for the purpose of including the ICA in the record.

Interim Compliance Tariff. The Commission's conclusion is directly contradicted by Globalcom's agreement that implementation of the ICA "is consistent with the public interest because it will promote facilities based local exchange competition and enhance Globalcom's ability to provide Illinois telecommunications users with a facilities based competitive alternative for local telephone services." (Am. Ill. Cross Ex. 1). This statement was made in the Joint Petition for approval of the ICA, verified by Globalcom's General Counsel on May 24, 2001, less than one year before filing the Complaint in this case.

The Commission's decision is contrary to law and established Commission precedent. It is well established that state commissions may not impose obligations, or confer rights, on the parties to a binding ICA which are inconsistent with the terms of that ICA. Michigan Bell Telephone Company v. MCI Metro Access Services, Inc., 128 F.Supp.2d 1043, 1054 (E.D. Mich. 2001) (holding that a state "cannot enforce or tariff in a manner that violates a party's rights under negotiated agreements"). This principle has been recognized by the Commission on numerous occasions. In MCI Metro Access Transmission Services, Inc. v. Illinois Bell Telephone Co., Docket 99-0379 (Sept. 24, 1999), for example, the Commission rejected an attempt by MCI to unilaterally switch from electronic to manual service orders, notwithstanding its obligation under a Section 252 interconnection agreement to place electronic orders. The Commission held that MCI could not invoke a state tariff that contradicted a valid and binding interconnection agreement:

> To allow MCI to avoid its obligations under the Agreement by simply invoking the terms of a tariff would have the effect of allowing one party to unilaterally amend the agreement. Such a result would undermine the integrity of the contract and the process of which it is a part, and would frustrate the federal scheme favoring individually negotiated agreements under the Telecommunications Act .

Id., slip op. at 33-34.

The Commission reaffirmed this principle in Docket 99-0511, where it rejected a proposal to amend the Interconnection Rule (83 Ill. Admin. Code Part 710) to allow CLECs with ICAs to "pick and choose" between their respective ICAs and effective tariffs. In doing so, the Commission stated that "the CLEC may not commit to an interconnection agreement only to ignore that contract when something better comes along." Order, Docket 99-0511 (March 27, 2002). See also, Order, Docket 01-0614, pp. 123-24 (June 11, 2002) (Commission rejected proposal to allow CLECs with ICAs to "prescribe to any offering" under Ameritech Illinois' wholesale tariff, finding such proposal to be "likely unlawful").

Accordingly, the only reason that Globalcom would have been permitted to obtain new EELs in December of 2001 (when it first made a request for new EELs) is that Ameritech Illinois took the initiative to file an Interim Compliance Tariff and voluntarily included in that tariff language a statement that CLECs with an effective ICA "shall be permitted to subscribe to the provisions under this tariff." (Ill.C.C. 20, Part 19, Section 22, Original Sheet No. 1). But for this provision, Globalcom would have had no right to request that Ameritech Illinois perform the work of combining UNEs to create new EELs even if it were collocated. Thus, the fact that the Company voluntarily offered to furnish Globalcom with new EELs, subject to a collocation requirement under the Interim Compliance Tariff, does not logically support a conclusion that Ameritech Illinois acted "anticompetitively" with respect to Globalcom.

In effect, the Order directs that (i) the terms of the Interim Compliance Tariff be retroactively amended to remove the collocation requirement for new EELs and (ii) Globalcom be allowed to unilaterally and retroactively amend the terms of its ICA by invoking the terms of that retroactively amended tariff. This decision is directly contrary to the principles respecting the "integrity of the contract" enunciated in MCI Metro Transmission Services, Docket 99-0379, supra. If a carrier is barred from unilaterally amending its ICA by "invoking the terms of a tariff" (Docket No. 99-0379, slip op. at 33-34), it stands to reason that the carrier should also be barred from unilaterally amending its ICA on a retroactive basis by attempting to retroactively amend a tariff and invoke the terms of the tariff as amended. That is, however, exactly what the Commission has allowed Globalcom to do in this case.

For these reasons, the Order's decision with respect to the collocation requirement:

(i) violates, and is preempted by, the 1996 Telecommunications Act, insofar as it imposes through a separate state tariff obligations that clash with the binding terms of an ICA created under Sections 251 and 252 of the 1996 Act;

(ii) violates federal law under the Sierra-Mobile doctrine, which provides that where parties have entered into a contract that is authorized by law, neither party may unilaterally abrogate that contract through reliance on a tariff, Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); and Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1274-82 (D.C. Cir. 1914) (affirming FCC's application of Sierra-Mobile doctrine to carrier contracts under the Telecommunications Act);

(iii) allows Globalcom to unilaterally abrogate its contract in violation of state law;

(iv) departs from established Commission precedent respecting the sanctity of contracts without providing a reasonable explanation for that departure; and

(v) is unsupported by adequate findings or substantial evidence in the record.

D. THERE IS NO BASIS TO CONCLUDE THAT AMERITECH ILLINOIS ACTED UNREASONABLY WITH RESPECT TO THE INTERIM COMPLIANCE TARIFF

To sustain a claim that a carrier's conduct violates Section 13-514, the complainant has the burden of proving that "the particular transgression was unreasonable in light of all of the relevant surrounding circumstances." 21st Century Telecom of Illinois, Inc., Docket 00-0219, pp. 26-27, 29 (June 15, 2000). Globalcom presented no evidence to support a finding that Ameritech Illinois acted unreasonably with respect to the development and filing of its Interim Compliance Tariff. As discussed above, the Interim Compliance Tariff was voluntarily filed by the Company in a good faith effort to make available to CLECs in an interim basis UNE combinations that would not otherwise have been available prior to the effective date of tariff amendments filed in compliance with the final Order in Docket 01-0614.

The Commission's decision to punish Ameritech Illinois for filing the Interim Compliance Tariff is particularly unfair and unlawful in light of the fact that the Company filed the tariff with the Commission's express permission in Docket 01-0586. In this regard, the Order's assertion (p. 36) that it "did not address (much less determine) the reasonableness underlying purpose of the collocation requirement" in Docket 01-0586 completely misses the point. The issue which the Order in this case purports to address is whether Ameritech Illinois' conduct in filing an Interim Compliance Tariff that included a collocation requirement for new EELs was "unreasonable" for purposes of Section 13-514. The "reasonableness" of the Company's conduct must be judged in light of the purpose of the Interim Compliance Tariff, which was to serve as an interim measure to make available to CLECs new products and services that would not otherwise have been available, pending a review by the Commission of the reasonableness of the terms and conditions of the proposed permanent compliance tariff in Docket 01-0614.

The Order, in effect, confuses the issue of whether the collocation requirement was a "reasonable" condition for the provision of new EELs (an issue addressed for the first time in Docket 01-0614) with the separate issue of whether Ameritech Illinois' conduct in filing the Interim Compliance Tariff was reasonable. Thus, the Order concludes that the inclusion of the collocation requirement in the Interim Compliance Tariff was "not reasonable" because "it should have been apparent to Ameritech Illinois in September, 2001, when it filed the Interim Compliance Tariff that the applicable authorities were not merely devoid of a collocation requirement, but expressly negates it." (Order, p. 34). The Order, however, cites only one "applicable authority" that "expressly negates" a "collocation requirement" for new EELs. That authority is the Order in Docket No. 01-0614, issued on June 11, 2002, nine months after the Interim Compliance Tariff was filed.

In essence, therefore, the Order finds that Ameritech Illinois should be held legally culpable, and required to pay damages, for failing to predict how the Commission would ultimately rule on a highly contested issue of first impression, i.e., the proper interpretation of Section 13-801(d)(3). The mere fact that the Commission ultimately disagreed with the Company's position on this issue does notlawfully justify a conclusion that Ameritech Illinois acted "unreasonably" and "knowingly" to impede competition in violation of Section 13-514. It is improper and unfair to punish a carrier for pursuing its legal rights in a contested tariff proceeding.

Moreover, the manner in which Ameritech Illinois defined a new EEL for purposes of both its proposed permanent compliance tariff and Interim Compliance Tariff was based on a reasonable, good faith interpretation of Section 13-801(d)(3). That Section expressly refers to combinations of the "unbundled network elements identified in the [Draft I2A]." 220 ILS 5/13-801(d)(3). With respect to EELs, the Draft I2A states in relevant part that "Ameritech Illinois will combine unbundled loops with unbundled dedicated transport as described herein to provide enhanced extended loop. . ." (Am. Ill. Ex. 4.1, Sch. WKW-2, p. 12; Draft I2A, Section X.3.1) (emphasis added). For purposes of this provision, "unbundled dedicated transport" is described as follows: "the unbundled dedicated transport facility will extend from CLEC customers Ameritech Serving Wire Center to CLECs collocation cage in a different Ameritech central office in the same LATA." (Am. Ill. Ex. 4.1, Sch. WKW-2, p. 12; Draft I2A, Section X.3.2) (emphasis added). The General Assembly should be presumed to have reviewed and understood the provisions of the Draft I2A when it enacted Section 13-801(d)(3). Contrary to the Order's conclusion (p. 37), therefore, it was entirely reasonable for Ameritech Illinois to "presume" that the General Assembly "imported the collocation requirement" of the Draft I2A into Section 13-801(d)(3).

As support for the conclusion that Ameritech Illinois' interpretation of Section 13-801(d)(3) was unreasonable, the Order quotes the Commission's statement in Docket 01-0614 that "[S]ection 13-801(d)(3) speaks only to Ameritech Illinois' obligation to combine the I2A combinations but is silent in respect to the restrictions and conditions that were included in [I2A], which are now only being reviewed by the Commission." (Order, p. 37). As demonstrated above, however, collocation is part and parcel of the I2A's definition of an EEL. In any event, the fact that the Commission arrived at a different conclusion in an Order issued on June 11, 2002 does not fairly or lawfully justify a finding that Ameritech Illinois acted "unreasonably" nine months earlier when it developed proposed tariff language based upon a different (and, in Ameritech Illinois' view, more reasonable) interpretation of Section 13-801(d)(3).

The Order (p. 37) concludes that the definition of a new EEL included in the Interim Compliance Tariff was "unilaterally fashioned" in derogation of "clear regulatory principles." The Order, however, does not cite a single order issued prior to the Order in Docket 01-0614 which supports the conclusion. The Order's reliance on the FCC's UNE Remand Order and Supplemental Order Clarification (Order, pp. 34-35) is directly contradicted by the FCC's decision in Application of SBC Communications, Inc. et al., Pursuant to Section 271 of the Telecommunications Act of 1996, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (Rel. June 30, 2000). In that case, the FCC expressly rejected an argument that the collocation requirement constitutes an unreasonable restriction on access to EELs, stating "as we indicated in the UNE Remand Order and in the Supplemental Order Clarification, collocation is a reasonable requirement for access to EELs." Id., ¶ 227.

In fact, the UNE Remand Order expressly states that an ILEC is not required to perform the work of combining UNE loops and dedicated transport facilities to create "new EELs" under any circumstances: "[W]e neither define the EEL as a separate unbundled network element nor interpret Rule 51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined'." (UNE Remand Order, ¶ 480). By offering new EELs, subject to a collocation requirement, Ameritech Illinois went beyond its obligations under the UNE Remand Order and, therefore, cannot reasonably be deemed to acted in "derogation" of the "principles" established in that order.

Moreover, the FCC made it clear that collocation is, in fact, a key characteristic of new EELs.

> The EEL allows requesting carriers to serve customers by extending a customer loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their deficiencies by transporting aggregated loops over efficient high capacity facilities to their central switching location. Thus, the cost of collocation can be diminished through the use of the EEL.

(UNE Remand Order, ¶ 288; Am. Ill. Ex. 4.1, p. 15) (emphasis added). The basis for including the EEL combinations in the Draft I2A, which was incorporated by reference in Section 13-801(d)(3), was consistent with the purpose of the EEL as recognized by the FCC in the UNE Remand Order, i.e., to unable CLECs with a single collocation arrangement to increase the number of potential customers it can serve by using an EEL to transport unbundled local traffic from distant central offices within the LATA back to its collocation arrangement. Accordingly, there is no basis for the Order's assertion that the Company's definition of an EEL was "unilaterally fashioned" in "derogation" of "clear regulatory principles."[15]

The Order quotes language from the UNE Remand Order which states that "incumbent LECs may not limit a competitor's ability to access network elements in order to combine them to collocation arrangements." (Order, pp. 34-35, quoting UNE Remand Order, n. 973). The specific issue addressed in the language quoted by the Order, however, involves the conditions under which an ILEC must provide a CLEC with access to UNEs for the purpose of allowing the CLEC to combine those UNEs for itself. However, Globalcom did not allege in its Complaint, nor did it present any evidence, that Ameritech Illinois failed to provide Globalcom with access to UNEs in a technically feasible manner that would have enabled Globalcom to combine those UNEs for itself.

Rather, Globalcom's complaint is that Ameritech Illinois did not offer to perform the work of combining UNEs to create "new EELs."[16] As previously discussed, in the UNE Remand Order (¶ 480), the FCC expressly declined to require that ILECs perform the work of combining UNEs to create new EELs on behalf of CLECs, except as a condition for the ILECs ability to take advantage of these "Switch Carve Out."[17] And, as previously discussed, in the context of the "Switch Carve Out," the FCC made it clear that the very reason for an EEL is to increase the number of customers that a collocated CLEC may reach by using the EEL to

[15] The Company's conclusion that collocation is a key aspect of the definition of a new EEL was also consistent with the premise that the purpose of new EELs is to enhance the ability of CLECs to provide local exchange service, not to serve as substitutes for special access service. Section 13-801(j) of the Act makes it clear that Section 13-801(d)(3) should not be interpreted as requiring Ameritech Illinois to substitute EELs (i.e., a combination of unbundled network elements) for special access services, a conclusion with which Globalcom witness Starkey concurred. (Tr. 94-95). Globalcom witness Wince made it abundantly clear that Globalcom is, in fact, seeking to obtain and use new EELs as substitutes for special access service. (Globalcom Ex. 1.0, p. 12).

[16] As previously discussed, Globalcom acknowledged that Ameritech Illinois had no obligation under its ICA to perform the work of combining UNEs to create "new EELs" under any circumstances, with or without a collocation arrangement.

[17] Ameritech Illinois has not invoked the "Switch Carve Out."

transport unbundled local loop traffic from distant central offices within the LATA back to its collocation arrangements. (UNE Remand Order, ¶ 288). It is unreasonable, therefore, to punish Ameritech Illinois for having failed to extrapolate from the discussion in footnote in 973 of the UNE Remand Order the principle that collocation may never be required under any circumstances, including circumstances (such as a request for the provision of new EELs) which were not addressed in the footnote.

The Order also relies on the FCC's Supplemental Order Clarification describing the three local use tests for the conversion of a special access circuit to a combination of UNE loops and transport. (Order, p. 35). As the Order correctly notes, collocation is not a requirement for conversion of a special access circuit to a UNE combination under the third local use test. The issue in this case, however, does not involve the conditions imposed by Ameritech Illinois for the conversion of special access circuits to an existing EEL (i.e., an existing combination of loop and dedicated transport UNEs). Once again, the issue is whether Ameritech Illinois reasonably included in its Interim Compliance Tariff a term requiring that a CLEC be collocated as a condition for requesting Ameritech Illinois to perform the work of combining loop and dedicated transport facilities to create new EELs. Once again, as previously discussed, in its UNE Remand Order, the FCC expressly declined to require ILECs to provide new EELs under any circumstances, with or without a collocation requirement and, in the context of the "Switch Carve- Out" condition, made it clear that collocation is a key characteristic of an EEL.

The Order (p. 35) incorrectly suggests that, at the time it filed its Interim Compliance Tariff, Ameritech Illinois "acknowledged its obligation" not to apply an "across the board collocation requirement" either to "new EELs or converted circuits." In support of this suggestion, the Order includes a partial quote from the portion of the Order in Docket No. 01-

0586 describing the purpose of the Interim Compliance Tariff. The full quote, with the words omitted in the Order underlined, is set forth below:

> The Petition recites that the purpose of the Interim Compliance Tariff is to enable Ameritech Illinois, pursuant to Sections 9-201 and 13-501 of the Public Utilities Act ("Act") to immediately (i) begin accepting and processing orders for the new unbundled network element combinations identified in the draft of the proposed Ameritech Illinois 271 amendment found in Schedule SJA-4 filed by Ameritech Illinois with the Commission in March 2001 in Docket No. 01-0700 (referred to in the Petition and in this Order as "I2A Combinations"), (ii) to include with the Company's unbundled local switching with shared transport ("ULS-ST") offering as described in Part 19, Section 21 of Tariff Ill. C.C. No. 20, a capability for the transmission of intraLATA toll calls originating from a purchasing carrier's retail end user customers who are being provided local exchange service using ULS-ST, where that purchasing carrier is also the pre-subscribed interLATA toll carrier, and (iii) implement interim tariff terms and conditions, to the extent that such are necessary, reflecting the Company's obligation to permit CLECs to reconfigure qualifying special access circuits to UNE loop transport combinations in a manner consistent with the Supplemental Order Clarification issued by the Federal Communications Commission ("FCC") in C.C. Docket No. 96-98. Petition, pp. 1-2.

(Order, Docket No. 01-0586, p. 1).

As the full quote above indicates, and is apparent from the face of the Interim Compliance Tariff itself, the reference to converting special access circuits to qualifying UNE loop-transport combinations "in a manner consistent with the Supplemental Order Clarification issued by the FCC," relates to the terms and conditions included in the Interim Compliance Tariff for the conversion of existing special access circuits to UNE combinations, not to the separate provisions of the Interim Compliance Tariff that relate specifically to the provision of the new UNE combinations (including new EELs) identified in the Draft I2A.Ameritech Illinois has not required collocation for a carrier seeking to convert existing special access circuits to existing EELs under the third local use test described in the FCC's Supplemental Order Clarification. On the other hand, as previously discussed, the Supplemental Order Clarification does not require Ameritech Illinois to provide new EELs under any circumstances. Accordingly, there is no basis for the Order's statement that Ameritech Illinois "did not fulfill" an acknowledged "obligation" under the Supplemental Order Clarification.

The Order (p. 35) asserts that "it is immaterial that the FCC was addressing conversion in the Supplemental Order Clarification rather than new EELs." In support of this statement, the Order (Id.) states that the "significant fact is that the FCC's ruling precluded the conclusion that an EEL necessarily involves collocation from either a legal or technical standpoint." (Id.) The Order, however, points to no language in any FCC Order which supports that assertion. How can the Commission conclude that the "FCC's ruling precluded the conclusion" that collocation is a legal requirement for a new EEL, when the UNE Remand Order (i) makes it clear that an ILEC is not required to provide a new EEL under any circumstances; and (ii) in the context of the Switch Carve Out condition, identifies collocation as a key characteristic of the EEL?

Finally, the Order (p. 37) states the "this Commission, the FCC and Ameritech itself define an EEL as a combination of loop, dedicated transport and any necessary multiplexing, irrespective of collocation." As discussed above, however, the FCC did not adopt such a definition as it relates to new EELs. The Commission adopted its definition in Docket 01-0614, after Ameritech Illinois filed its Interim Compliance Tariff. And the tariff cited by the Commission as evidence of Ameritech Illinois' definition is the existing EELs tariff, filed on July 11, 2002, in compliance with the Order in Docket 01-0614. It is illogical and unfair for the Commission to rely on Ameritech Illinois' compliance with the Order in Docket 01-0614 to impeach the Company's position that it acted reasonably by including a collocation requirement in the definition of new EELs set forth in the Interim Compliance Tariff filed nine months earlier.

For all the reasons discussed above, there also is no legal or evidentiary basis for the Order's finding (p. 38) that Ameritech Illinois acted "knowingly" within the meaning of Section 13-514. In support of this finding, the Order states that "Ameritech was familiar with the rulings, statutes and regulations pertinent to this issue and, indeed, participated in the proceedings that produced many of these authorities." As discussed, however, with the exception of the Order in Docket 01-0614, the Order does not cite one "ruling, statute or regulation" to support the Order's conclusion that Ameritech Illinois knew (or even should have known) that its definition of a new EEL was unreasonable. Thus, the Commission is attributing to Ameritech Illinois beforehand "knowledge" of the way that the Commission would ultimately rule on this issue in Docket No. 01-0614. Notwithstanding the Order's statement to the contrary (p. 38), the Commission has clearly imposed "hindsight judgment."

In summary, Ameritech Illinois emphasizes that the issue here is not whether the <u>Commission</u> could reasonably conclude, based on an analysis of past FCC Orders and Section 13-801(d)(3), that collocation should not be a requirement for new EELs.[18] Rather, the issue is whether Ameritech Illinois acted unreasonably in taking and defending a position in Docket No. 01-0614 on the issue of first impression (the proper interpretation of Section 13-801(d)(3)) that was different from the position ultimately adopted by the Commission. As the above discussion demonstrates, there is simply no basis for the Order's conclusion that Ameritech Illinois unreasonably defined new EELs for the purpose of its Interim Compliance Tariff in a manner that the Company knew to be in "derogation" of "clear regulatory principles." (Order, p. 37). At most, the Commission could conclude (as it did in Docket No. 01-0614) that it does not agree with Ameritech Illinois' interpretation of Section 13-801(d)(3)and the FCC's orders as they

[18] As explained in its Application for Rehearing in Docket 01-0614 (at 22-23, incorporated by reference), Ameritech Illinois continues to argue that that decision, and hence the order here, violate federal law and the FCC's EEL requirements.

relate to the collocation issue. The fact that the Commission may disagree with a party's interpretation of the law (and particularly a new statute, such as Section 13-801(d)(3)) does not , however, justify a conclusion that the parties acted unreasonably and knowingly to impede the development of competition.

E. THE ORDER VIOLATES AMERITECH ILLINOIS' CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT

For the reasons discussed above, the Commission's decision in this case effectively punishes Ameritech Illinois for taking and defending, in good faith, a position on a contested issue of first impression (i.e., the proper definition of an EEL, as identified in the Draft I2A and incorporated by reference in Section 13-801(d)(3)) which had not previously been interpreted by the Commission or a court. The Order, therefore, violates Ameritech Illinois' right to petition the Government under the First Amendment of the United States Constitution, and under the Illinois Constitution. The United States Supreme Court has held that "the right to petition extends to all departments of the Government." California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). In particular, the First Amendment protects the right of a party, such as Ameritech Illinois, to "use the channels and procedures of state and federal agencies and courts to advocate [its] causes and points of view respecting resolution of [its] business and economic interests vis-à-vis competitors." Id. at 511.

F. THE ORDER'S RESOLUTION OF THE COLLOCATION ISSUE VIOLATES THE FILED RATE DOCTRINE

As the Order (p. 36) expressly acknowledges, under the "filed rate doctrine," Ameritech Illinois was not only "allowed" to "act in accordance with the [Interim Compliance Tariff]," it was "required" to do so. AT&T v. Central Office Telephone, 524 U.S. 214, 222 (1998) ("under the filed rate doctrine, the 'rate of the carrier duly filed is the only lawfully charge'" and "deviation from it is not permitted under any pretext"); In Re Illinois Bell Switching Station Litigation, 641 N.E.2d 440, 446 (Ill. 1994) (Justice Miller specially concurring) ("A company may not deviate from the terms of its tariff . . ."). Thus, as the ALJ correctly recognized in his Ruling on Ameritech Illinois' Motion to Dismiss, under the filed rate doctrine, when a regulated entity acts in accordance with the terms of its tariff, "the entity cannot be blamed." (ALJ Ruling, p. 9, July 5, 2002) (emphasis added). Accordingly, there is no lawful basis for the Commission to cast "blame" on Ameritech Illinois by holding it legally culpable for enforcing the terms of the Interim Compliance Tariff. Yet that is precisely what the Order purports to do.

The Order appears to concede that the filed rate doctrine would bar any claim by Globalcom that Ameritech Illinois' enforcement of the collocation requirement of the Interim Compliance Tariff was unlawful. The Order, however, attempts to circumvent the filed-rate doctrine by characterizing Globalcom's Complaint as a "claim that the tariff itself was designed to, and did, impede competition and that remedies for filing that tariff – not for enforcing it – should be imposed pursuant to Section 13-514." (Order, p. 32). As a remedy, the Order awards Globalcom damages based on the difference between the rates it paid under the terms of the Illinois special access tariff and the rates that it would have paid for EELs under the terms of a different tariff (the Interim Compliance Tariff) if the terms of the Interim Compliance Tariff had been different, i.e., what the tariff would have been "but for" alleged anticompetitive act of filing the tariff. The filed rate doctrine clearly bars Globalcom's claim (as articulated in the Order) and the "remedy" granted:

> Simply stated, "[t]he filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8^{th} Cir.) (citing Arkansas-Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981), cert denied, 504 U.S. 957 (1992).

Goldwasser v. Ameritech Corporation, 1988 WL 60878 (N.D. Ill., 1998).

Contrary to the Order's suggestion (p. 36), application of the filed rate doctrine does not depend on whether the Commission performed a full review of the "reasonableness" of the tariff before allowing it to become effective. To the contrary, for the doctrine to apply, "[t]he rate must merely be filed and technically approved by the agency. It need not have been actively reviewed for accuracy or public interest considerations – indeed, it need not have been reviewed at all in any meaningful sense." IA Areeda & Hovenkamp, Antitrust Law, ¶ 247a at 110 (1997). The Supreme Court repeatedly has confirmed this principle, explaining that the filed rate doctrine is not to be "narrow[ly] read[]" to apply only where rates have been "investigated and approved"; rather, it applies "whenever tariffs have been filed," even if there was never any hearing or review of those tariffs. Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 417 & n.19 (1986); see also Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 374 (1988) (filed rate doctrine does not depend on "whether a particular matter was actually determined in the FERC proceedings"); Montana-Dakota Utils., 341 U.S. at 251 (customer "can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the Commission") (emphasis added).[19]

Furthermore, Globalcom's claim (as articulated by the Commission) that the tariff was "designed to, and did impede competition" and that the mere act of filing the tariff was "anticompetitive" is precisely the type of claim that is barred by the filed rate doctrine. E.g., Keogh v. Chicago N.W. Ry. Co., 260 U.S. 156 (1922) (antitrust claim alleging conspiracy to file

[19] In this case, of course, the Commission did not "merely accept" the Interim Compliance Tariff. Rather, it reviewed the tariff and issued an Order expressly finding "good cause" to allow the tariff to become effective on less than 45 days notice. Order, Docket 01-0586, p. 2 (Sept. 18, 2001). Further, as described above in the discussion of termination charges and the filed rate doctrine, the Order also violates the anti-discrimination purpose of the filed rate doctrine by allowing Globalcom to obtain the exact same service as other customers at a dramatically reduced price.

anticompetitive rates barred by filed rate doctrine); Square D, 476 U.S. 409 (claim for price fixing in tariffs filed by group of motor carriers and request for damages based on difference between the filed rate and what rates should have been dismissed under filed rate doctrine); Marcus v. AT&T Corp., 138 F3d 46, 58 (1998) ("application of the filed rate doctrine in a particular case is not determined by the culpability of the defendants' conduct or the possibility of inequitable results"); County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858 (9th Cir. 1997) (holding that filed rate doctrine barred claim for damages based on allegation that filed rate was result of unlawful conduct).

Although the Commission characterizes Globalcom's claim as one directed to the alleged "misconduct" by Ameritech Illinois in filing "the tariff" (as opposed to "enforcing it") such "artful pleading" cannot avoid the filed rate doctrine. Indeed, the Eighth Circuit has rejected an argument very similar to that attributed by the Order to Globalcom:

> The H.J. class seemingly departs from its request for damages contained in its first amended complaint and says that it is not challenging the reasonableness of any rate the Commission previously approved, but instead, is seeking damages due to Northwestern Bell's RICO violations. * * * We are unpersuaded * * * [T]he H.J. class's claim is simply that its members have been injured because they paid too much for telephone services * * * a damage concept that falls squarely within the filed rate doctrine.

H.J., 954 F2d at 492, citing Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981); see also Cahnmann, 133 F.3d at 490; County of Stanislaus, 114 F.3d at 866 ("In reality, though framed as a challenge to access [to a gas pipeline], this claim, too, is little more than a challenge to rates that FERC approved"). The same analysis applies here, and the imposition of retroactive damages should therefore be removed.[20]

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[20] Contrary to the Order's assertion, Ameritech Illinois has never contended that the Order in Docket 01-0586 "permanently inoculat[ed] [the tariff] against subsequent regulatory scrutiny" (Order, p. 36). To the contrary, Ameritech Illinois understood and expected that, to the extent the terms and conditions of the Interim Compliance Tariff (including the collocation requirement for new EELs) mirrored those of the proposed permanent compliance tariffs, the reasonableness of those terms would be fully reviewed in Docket 01-0614. The

G. The Order Violates The Rule Against Retroactive Ratemaking

As discussed above, the effect of the Order is to retroactively amend the terms of the Interim Compliance Tariff which the Commission authorized the Company to place into effect upon a finding of "good cause" to remove the collocation requirement for new EELs and to require a refund or credit based on the tariff as amended. The Order's decision in this regard violates not only the filed rate doctrine but also the rule against retroactive ratemaking. That rule precludes "refunds when rates are too high and surcharges when rates are too low." Citizens Utils. Co. v. Illinois Commerce Comm'n., 124 Ill.2d 195, 207 (1988). The rule holds that the Commission cannot "make adjustments to or rescind" prior orders "so as to retroactively deny [a utility] revenues or benefits which had previously been approved." United Cities Gas Co. v. Illinois Commerce Comm'n., 163 Ill.2d 1, 15 (1994). That, however, is precisely what the decision here does in awarding retroative "damages" based on a new view of what the Interim Compliance Tariff "should have" said.

H. The Commission's Findings Of Specific Per Se Violations Of Section 13-514 Are Unsupported By Adequate Findings Of Fact And Substantial Evidence On The Record

For all the reasons previously discussed, there is no basis for a finding that Ameritech Illinois acted unreasonably with respect to the Interim Compliance Tariff. Accordingly, there is no basis for a finding that Ameritech Illinois violated any provision of Section 13-514. The

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filed rate doctrine, however, precludes a retroactive imposition of damages based on what the difference would have been between the filed tariff and and the tariff the Commission later determines should be filed. The only permissible "remedy" in that circumstance is prospective. Indeed, the ALJ Decision here is directly inconsistent with the Order in Docket 01-0614, in which the Company was directed to file revised tariffs in accordance with that Order's finding "within thirty days of its service." (Order, Docket 01-0614 at 178). In accordance with this directive, Ameritech Illinois filed a compliance tariff in July 11, 2002, thirty days after service of the Order in Docket 01-0614, which, among other things, removed the collocation requirement for new EELs. The Compliance Tariff became effective on July 12, 2002, one day after filing. The Order in this case requires Ameritech Illinois to pay "damages" to Globalcom based on the difference between intrastate special access rates and EEL rates beginning in December 2001. Thus, the Order effectively orders a retroactive elimination of the collocation requirement from the Interim Compliance Tariff for a seven month period prior to July 11, 2002.

Commission's conclusions with respect to specific subsections of Section 13-514 are also unsupported by adequate findings of fact and substantial evidence on the record.

1. Section 13-514(11)

The Commission concludes that the Company violated subsection 13-514(11) ("violating the obligations of Section 13-801"). As previously discussed, however, the provision of Section 13-801 that Ameritech Illinois was accused of violating (Section 13-801(d)(3)) was not self-activating. The Commission completed its review of the tariffs filed to comply with Section 13-801(d)(3) in Docket 01-0614 and Ameritech Illinois has filed amended tariffs complying with the statute as interpreted by the Commission. The Company's voluntary decision to implement an Interim Compliance Tariff to make combinations available on an interim basis pending completion of Docket 01-0614 does not violate Section 13-801 or any other provision of state law.

Moreover, Section 13-801(j) makes it clear that nothing in Section 13-801 (including 13-801(d)(3)) is "intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements . . ." 220 ILCS 5/13-801(j). Thus, 13-801 does not establish that Ameritech Illinois must provide new and existing combinations of UNEs (including new EELs) as substitutes for the purchase of special access service, a fact acknowledged by Globalcom witness Starkey. (Tr. 94-95). Mr. Wince made it clear in his direct testimony that Globalcom is seeking to obtain and use new EELs as substitutes for special access service. (Globalcom Ex. 1.0, p. 12).

2. Section 13-514(6)

The Order also concludes that Ameritech Illinois violated subsection 13-514(6) ("unreasonably acting . . . in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers"). In support this conclusion, the Order (p. 37) finds that "by increasing competitive operating costs, the collocation requirement impaired Globalcom's ability to offer services." This finding is unsupported by the evidence.

First, there is no evidence to support the conclusion that Ameritech Illinois acted "unreasonably."

Second, the inclusion of a collocation requirement for new EELs in the Interim Compliance Tariff did not "increase" Globalcom's "competitive operating costs" since Globalcom had not previously purchased any new EELs and, in fact, had no right to purchase new EELs under the terms of its ICA. Accordingly, Ameritech Illinois' interim offer of new EELs subject to a collocation requirement could not possibly have "impaired" Globalcom's ability to offer services.

Third, there is no evidence that Globalcom's inability to order new EELS prior to July 11, 2002 (when Ameritech Illinois filed its tariff complying with the Order in Docket 01-0614) has "impaired" Globalcom's ability to compete. To the contrary, as previously discussed, Globalcom admitted that the implementation of the ICA, which expressly disclaims any obligation of Ameritech Illinois to furnish new EELs, "enhances" Globalcom's ability to compete and "promotes" facilities based competition. (Am. Ill. Cross Ex. 2). Moreover, the unrefuted evidence demonstrates that there are numerous competitive special access alternatives to Ameritech Illinois in the Chicago market. (Am. Ill. Ex. 7.0, p. 11). The FCC has recently found that the Ameritech Illinois has presented data "demonstrat[ing] that competition for the [special access] services at issue within the [Chicago] MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period." <u>In the Matter</u>

of Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services for Ameritech Operating Companies et al., CCB/CPD No. 01-32, Memorandum Opinion and Order, DA 02-23, p. 4 (rel. April 11, 2002). (Am. Ill. Ex.3.0, p. 28). Furthermore, the evidence presented by Globalcom demonstrates that the amounts paid by Globalcom to Ameritech Illinois for special access service under term agreements are significantly less than the retail prices charged by Ameritech Illinois under agreements with comparable terms for the type of retail services for which Globalcom claims to be competing. (Globalcom Ex. 5.1).

The Order simply presumes without more that any impediment to a carrier's ability to replace special access services with lower priced network elements constitutes an impairment of its ability to compete. This presumption is erroneous as a matter of law. In AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) ("IUB II"), the Supreme Court vacated the FCC's initial unbundling rules because their provision for "blanket access" to network elements was inconsistent with the "necessary" and "impair" standards of Section 251(d)(2). In doing so, the Court also made clear that a difference in cost or reduction in quality, standing alone, is not adequate to justify a finding of impairment. Id. at 389-90. See also United States Telecom Association et al. v. Federal Communications Commission et al., 290 F3d 415, 427 (D.C. Cir., May 24, 2002) (in applying the impairment standard, it is improper to "rely on cost disparities that are universal as between new entrants and incumbents in any industry.")

In any event, Globalcom could have obtained access to new EELs (assuming they qualified under the FCC's local use test and "no commingling" rules) by establishing a collocation arrangement. The Order cites Globalcom's claim that "it could not rationally and affordably procure new EELs" in light of its estimated cost of collocation of "no less than $500,000." (Order, p. 31). But that estimate assumed that Globalcom would erect a collocation cage at an Ameritech Illinois central office. (Tr. 232). Globalcom provided no estimate of the cost that would be incurred to establish a virtual collocation arrangement, which does not require the erection of a collocation cage. (Id.) Accordingly, there is no evidence to support Globalcom's claim that the collocation requirement made new EELs "unaffordable."

3. Subsection 13-514(10)

The Order (p. 38) concludes that Ameritech Illinois "contravened" subsection 13-514(10) ("unreasonably failing to offer network elements that the Commission or the [FCC] has determined must be offered on an unbundled basis to another carrier in a manner consistent with the Commission's or [FCC's] orders or rules requiring such offering"). As previously discussed, however, when Ameritech Illinois filed its Interim Compliance Tariff, no orders had been issued by either the Commission or the FCC requiring Ameritech Illinois to offer new EELs under any circumstances, with or without a collocation requirement. Accordingly, there is no basis for the Commission's conclusion that including the collocation requirement for new EELs in the Interim Compliance Tariff violated Section 13-514(10).

4. The Order Is Contrary To The Commission's Interpretation Of The Scope Of Sections 13-514 And 13-515

The Order is directly contrary to the Commission's holding in Rhythms Links, Inc. v. Illinois Bell Telephone Company, Docket 99-0465 (Dec. 2, 1999). In that case, the Commission rejected a complaint in which a CLEC alleged that amendments made by Ameritech Illinois to its collocation tariff were "anticompetitive" and in violation of Section 13-514 because those amendments did not, in the CLEC's view, satisfy the requirements of an FCC order. In rejecting the Complaint, the Commission stated as follows: "The Commission agrees with Ameritech's and Staff's position that changes to the terms and conditions of a tariff can be reviewed only in the context of a Section 9-201 or 9-250 proceeding. There is no language in Sections 13-514 or

13-515 indicating that these Sections were intended to replace the established procedural mechanisms for reviewing, approving and, if necessary, ordering changes to a carrier's tariff." Order, Docket 99-0465, p.13.

The Order does not contain a reasoned explanation for its departure from the precedent established in Rhythms Links. In its Complaint, Globalcom (like the complainant in Rhythms Links) alleged that a provision of a tariff (in this case, the new EELs collocation requirement of the Interim Compliance Tariff and Proposed Permanent Complaint Tariff) was anticompetitive and, therefore, in violation of Section 13-514. In accordance with the holding in Rhythms Links, it was Docket 01-0614, a tariff investigation initiated pursuant to Section 9-201 of the Act, not this Section 13-515 complaint proceeding, in which the reasonableness of the Company's tariffed terms and conditions for the provision of new EELs was properly addressed.

I. THE ORDER IS CONTRARY TO THE NOTICE REQUIREMENTS OF SECTION 13-515

The Order is also contrary to the notice requirements of Section 13-515 of the Act. Section 13-515(c) provides that a complaint for a violation of Section 13-514 may not be filed unless the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation. 220 ILCS 5/13-515(c). Section 13-515(d)(2) requires that any complaint filed under that Section include a statement that the respondent was provided the notice required under Section 13-515(c), and that the respondent failed to "correct the situation as requested." Thus, it is clear that a complaint may only be brought under Section 13-515 for alleged violations of Section 13-514 that the respondent actually has an opportunity to correct.

In the Notice of alleged violation sent to Ameritech Illinois on March 14, 2002, Globalcom demanded that Ameritech Illinois take corrective action by providing Globalcom with new EELs that did not terminate in a collocation arrangement. To grant Globalcom's request, however, Ameritech Illinois would have been required to provide Globalcom with new EELs in a manner inconsistent with the terms of the Interim Compliance Tariff -- terms the ALJ Decision acknowledges Ameritech Illinois was both "allowed" and "required" to enforce. (ALJ Decision, p. 32). Globalcom's Notice did <u>not</u> allege that Ameritech Illinois had violated the law by including the collocation requirement in the Interim Compliance Tariff in the first place. Even if it had made such an allegation, however, there would have been no way for Ameritech Illinois "to correct the situation" since the tariff was already in effect and Ameritech Illinois was bound to enforce it. Thus, the only way for Ameritech Illinois to "correct the situation" was to await the Commission decision in Docket 01-0614 where the collocation issue had already been fully briefed by the time that Globalcom submitted its Notice, and remove the collocation requirement from its EELs tariff in the event that the Commission ruled in Globalcom's favor on that issue. In its final Order in Docket 01-0614, the Commission did direct Ameritech Illinois to remove the collocation requirement from its tariffs on a prospective basis and the Company has done so.

In these circumstances, Section 13-515 does not authorize the Commission to override the filed rate doctrine by ordering Ameritech Illinois to <u>retroactively</u> adjust the terms of the Interim Compliance Tariff. That is, however, what the Order has decided to do by ordering Ameritech Illinois to make refunds or credits to Globalcom for a period of time during which the collocation requirement was part of an effective tariff. In effect, the Order proposes that Ameritech Illinois be required to retroactively waive the collocation requirement of its Interim

Compliance Tariff even though the Company did not, as the Order acknowledges, have the obligation or right to waive that requirement in March 2002, when Globalcom notified Ameritech Illinois of the alleged violation.

IV. CONCLUSION

For all the reasons discussed herein, the Commission should grant rehearing, modify its Order as discussed above, and deny Globalcom's complaint and the relief requested therein in its entirety.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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One of Its Attorneys

Karl B. Anderson
Ameritech Illinois
225 West Randolph Street
Floor 25D
Chicago, IL 60606
(312) 727-2928

Demetrios G. Metropoulos
Mayer Brown Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 701-8479

CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **AMERITECH ILLINOIS' APPLICATION FOR REHEARING** was served on the persons on the attached service list by U. S. Mail and by electronic transmission on November 22, 2002.

____
Karl B. Anderson

SERVICE LIST FOR ICC DOCKET NO. 02-0365

David Gilbert
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601-3104
dgilbert@icc.state.il.us

Mark Hanson
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 52701
mhanson@icc.state.il.us

Matthew Harvey
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601-3104
mharvey@icc.state.il.us

M. Gavin McCarty
Globalcom, Inc.
333 West Wacker Drive
Suite 1500
Chicago, IL 60606
gmccarty@global-com.com

Thomas Rowland
Stephen J. Moore
Rowland & Moore
77 West Wacker Drive
Suite 4600
Chicago, IL 60601
tom@telecomreg.com
steve@telecomreg.com

Mary Stephenson
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601-3104
mstephen@icc.state.il.us